IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1924. 1925

No. 1[redacted]4[redacted] 120

LOUISIANA WESTERN RAILROAD COMPANY,
Petitioner,

versus

JOHN B. GARDINER,
Respondent.

Petition for Writ of Certiorari to Be Addressed to the Court of Appeal for the First Circuit, State of Louisiana, and Brief in Support Thereof.

Philip S. Pugh,
George Denegre,
Victor Leovy,
Henry H. Chaffe,
Harry McCall,
Jas. Hy. Bruns,
Attorneys for Petitioner.

New Orleans,
June, 1925.

Montgomery-Andree Printing Co., Inc. 307 Chartres Street, New Orleans, La.

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In the

SUPREME COURT OF THE UNITED STATES.

No. 1250

LOUISIANA WESTERN RAILROAD COMPANY,
Petitioner,

verusus

JOHN B. GARDINER,
Respondent.

In re: Louisiana Western Railroad Company Applying for Writ of Certiorari to the Court of Appeal for the First Circuit, State of Louisiana.

To the Honorable the Supreme Court of the United States:

The petition of Louisiana Western Railroad Company respectfully shows to this Court:

That your petitioner is greatly aggrieved by the final judgment and opinion of the Court of Appeal for the First Circuit, State of Louisiana, in the case of John B. Gardiner vs. Louisiana Western Railroad Company, No. 867 of the docket of the said Court, wherein the

said Court held in an action for loss of and damage to an interstate shipment against a common carrier for hire that Act No. 223 of the General Assembly of the State of Louisiana, passed at the Regular Session of 1914, providing that

> "All actions for loss of or damage to shipments of freight, shall be prescribed by two years, said prescription to run from the date of shipment,"

was inapplicable (although more than two years from the date of shipment had elapsed before the institution of the said suit) by reason of:

1. Paragraph 11 of section 20 of the Interstate Commerce Act (Act of February 4, 1887, 24 Stat. at L. 379, as amended by Transportation Act 1920, Act of February 28, 1920, 41 Stat. at L. 456, 494), providing that:

> "It shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period * * for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice",

which the said Court construed as a Federal statute of limitations;

2. The following clause in the condition of the bill of lading covering the said shipment:

> "Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property",

such period not having elapsed when this suit was brought, which clause the said Court regarded as supplanting and waiving the shorter state statute of limitations, all as more fully shown by the facts, including copies of pleas and judgments, hereinafter set forth, and by the opinion of said Court of Appeal embodied in the transcript of record filed in connection with writ of error herein, hereinafter referred to.

Petitioner avers that the portion of the Interstate Commerce Act relied on by the said Court as a statute of limitations is not a statute of limitations, but simply a restriction on the freedom of carriers in fixing "by contract, rule, regulation or otherwise" the time after which suit may not be brought; and that in so far as the clause of the bill of lading is concerned, that is rendered illegal, null and void by the language of the Interstate Commerce Act above quoted, since the bill of lading named a shorter period of limitation than that authorized by the statute to be provided "by rule, contract, regulation or otherwise."

Petitioner further insists that even had the bill of lading provision been legal and valid, the shorter limitation provided by the state statute was not thereby supplanted or waived, and should have been applied.

Petitioner now avers the facts and history of this case to be as follows:

That on April 12th, 1922, John B. Gardiner, respondent herein, instituted suit in the Eighteenth Judicial District Court for the Parish of Acadia, State of Louisiana, against your petitioner, Louisiana West-

ern Railroad Company, for the sum of Three Hundred Twenty-Four Dollars ($324.00) for loss of and damage to a shipment of household goods and two automobiles made on April 3rd, 1920, by the said Gardiner from Crowley, Louisiana, to himself at Murray, Kentucky, via your petitioner as the initial carrier (two through bills of lading covering the said articles being issued by petitioner), which said shipment in its damaged condition was by the last connecting carrier delivered to Gardiner at destination on April 15th, 1920.

That your petitioner in due course appeared and filed a plea based on Act No. 223 of the General Assembly of the State of Louisiana, passed at the Regular Session of 1914, providing that:

> "All actions for loss of or damage to shipments of freight, shall be prescribed by two years, said prescription to run from the date of shipment."

That on May 10, 1922, the said District Court maintained petitioner's plea and dismissed the suit, the decree reading as follows:

> "A plea of prescription having been filed by defendants in this cause and same having been argued and submitted and the law being in favor of the said plea and of said defendant,
>
> "It is therefore ordered, adjudged and decreed that the plea of prescription of two (2)

> years filed herein be and it is hereby maintained and plaintiff's suit dismissed at his costs,"

from which judgment Gardiner took an appeal to the Court of Appeal for the First Circuit, State of Louisiana, which Court on December 6th, 1922, reversed the judgment of the said District Court and remanded the cause for further proceedings, the decree reading as follows:

> "The judgment appealed from is reversed, the plea of prescription overruled, and the case remanded to be proceeded with in accordance with law.

That on March 18th, 1924, the said cause so remanded was tried before the said District Court, which on March 18th, 1924, overruled the renewed plea based on the state statute of limitations and entered judgment in favor of Gardiner and against your petitioner in the full amount claimed, said judgment reading as follows:

> "This case was regularly tried, argued and submitted, and for the reason of the law and the evidence being in favor of the plaintiff, and against the defendant;
>
> **"It is ordered, adjudged and decreed** that the plaintiff, **John B. Gardiner,** do have judgment and recover of the **Louisiana Western Railroad Company,** in the full sum of **three hundred twenty-four ($324.00) dollars,** with five per cent interest from July 9, 1920 until paid, and all costs.

> "**It is further decreed** that the plaintiff's plea of prescription against the reconventional demands of the defendant be maintained, and that the said reconventional demands be and the same are hereby rejected, at defendant's cost.

That from such judgment your petitioner took an appeal to the Court of Appeal for the First Circuit, State of Louisiana, where the said cause was entered and docketed, being entitled "John B. Gardiner vs. Louisiana Western Railroad Company" and numbered 867 on said docket.

That on October 22nd, 1924, the case came on to be heard in the said Court of Appeal before the Honorable Julian Mouton, the Honorable Paul Leche and the Honorable Clay Elliott, Judges of the said Court; and on December 30th, 1924, a decree was entered in the said cause, as follows:

> "It is therefore ordered, adjudged and decreed that there be judgment in favor of the plaintiff, John B. Gardiner, and against the defendant, Louisiana Western Railroad Company, for $324.00, with legal interest thereon from July 9th, 1920, until paid, less and subject to $103.00 as credit applied thereto July 9th, 1920, and as thus amended that the judgment appealed from be affirmed. Defendant and appellant to pay the cost of the lower court; the plaintiff and appellee the cost of appeal.

That said court filed in connection with said judgment an opinion to be found in the transcript hereinafter referred to, stating its reasons as herein set forth.

That your petitioner in due course applied for a rehearing, which was on February 18th, 1925, denied. That your petitioner thereupon and in due course applied to the Supreme Court of the State of Louisiana (the Court of last resort in the said State) for writs of review, which application was on March 30th, 1925, denied.

Your petitioner is advised that the judgment of the Court of Appeal for the First Circuit, State of Louisiana, handed down on December 30th, 1924, hereinabove set forth, is final (having become so on March 30th, 1925, when the Supreme Court of the State of Louisiana refused petitioner's application for writs of review) and is erroneous and that this Honorable Court should require the case to be certified to it for its review and determination under the Act of Congress permitting causes made final in the State Courts to be certified for revision.

Your petitioner shows that in stating in said opinions its reasons for declining to apply the said state statute of limitations, the said Court of Appeal relied on paragraph 11 of section 20 of the Interstate Commerce Act, as amended, and on the clause in the bills of lading,

both hereinabove quoted, as supplanting and waiving the said state statute, so that the entire basis of the action of the said Court of Appeal in declining to maintain petitioner's plea based on the state statute of limitations rested on a construction and interpretation of a clause in an interstate bill of lading and a clause of the Interstate Commerce Act, as amended, which your petitioner insists to have been erroneous.

SPECIFICATION OF ERRORS.

Your petitioner urges that the Court of Appeal for the First Circuit, State of Louisiana, erred in the following particulars:

1. In regarding paragraph 11 of section 20 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, reading:

> "It shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period * * * for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice",

as a federal statute of limitation.

2. In regarding as legal and valid the provision in the bills of lading in question that

> "suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property."

3. In not holding, even if the said bill of lading provision were legal and valid (which is denied) that it did not have the effect of supplanting or waiving Act No. 223 of the General Assembly of the State of Louisiana, passed at the Regular Session of 1914, that

> "All actions for loss of or damage to shipments of freight, shall be prescribed by two years, said prescription to run from the date of shipment."

4. In not holding that the Louisiana statute of limitation (Act No. 223 of 1914):

> "All actions for loss of or damage to shipments of freight, shall be prescribed by two years, said prescription to run from the date of shipment",

applied to this case and constituted an absolute bar to plaintiff's claim.

That this case, therefore, involves the application vel non of a state statute of limitations to a suit for loss of and damage to an interstate shipment, which necessitates the interpretation of an important provision of the Interstate Commerce Act and the interpretation of a clause in the bills of lading covering the said interstate shipment; and the final and authoritative decision by this Court of the questions presented is highly desirable from the point of view of the carriers and the shipping public, since there are numerous disputed claims turning on the answer to these questions, involving large sums of money.

Your petitioner shows that there has already been filed in this Honorable Court a petition for a writ of

error in this case, entitled "Louisiana Western Railroad Company vs. John B. Gardiner," being No. 1250, October Term, 1924, and petitioner by reference attaches hereto the copy of the transcript of record of the case, already lodged in this Court in connection with the said writ of error, this being done by stipulation annexed hereto, signed by counsel for Gardiner.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Court of Appeal for the First Circuit, State of Louisiana, commanding that Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of the said Court of Appeal had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by law, and that the said judgment of the Court of Appeal for the First Circuit, State of Louisiana, be reversed by this Honorable Court, and for such further relief as may seem proper, and your petitioner will ever pray.

P. S. Pugh,
Geo. Denegre,
Victor Leovy,
Henry H. Chaffe,
Harry McCall,
Jas. Hy. Bruns,
Attorneys for Petitioner.

STATE OF LOUISIANA,
PARISH OF ORLEANS.

Before me, the undersigned authority, personally came and appeared **Harry McCall,** who, being first duly sworn, deposes and says:

That he is one of the attorneys for the petitioner herein; that he is thoroughly familiar with the above proceedings, and that the facts therein stated are true and correct, to the best of his knowledge, information and belief; and that he verily believes them to be true; and that in his opinion the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

Harry McCall.

Sworn to and subscribed before me at New Orleans, La., this 4th day of June, 1925.

Edward L. Gladney, Jr.,
Notary Public

(Seal)

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1924.

No. 1250.

LOUISIANA WESTERN RAILROAD COMPANY,
Petitioner,

versus

JOHN B. GARDINER,
Respondent.

In re: Louisiana Western Railroad Company Applying for Writs of Certiorari to the Court of Appeal for the First Circuit, State of Louisiana.

BRIEF IN SUPPORT OF APPLICATION.

I.
STATEMENT OF CASE.

The question presented by this case is whether or not the State Statute of Louisiana, Act No. 223 of 1914, providing that:

> "All actions for loss of or damage to shipments of freight, shall be prescribed by two

> years, said prescription to run from the date of shipment"

operates as a bar to an action against a common carrier for hire brought in a court of the State of Louisiana for loss of or damage to an interstate shipment made more than two years before the filing of suit, but delivered at destination less than two years before such date, the bills of lading (of which there were two, some of the articles shipped being covered by one and the rest by the other) covering said shipment containing a clause to the effect that:

> "Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property."

It is the contention of plaintiff, upheld by the State Court, that the state prescriptive statute is inapplicable because:

(1) A federal statute of limitations is provided by Paragraph 11 of Section 20 of the Interstate Commerce Act (Act of February 4, 1887, 24 Stat. at L. 379, as amended by the Transportation Act 1920, Act of February 28, 1920, 41 Stat. at L. 456, 494), reading:

> "It shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise a shorter period * * * for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the

carrier has disallowed the claim or any part or parts thereof specified in the notice",

and

(2) The clause in the bills of lading above quoted is a contractual limitation supplanting and waiving the state statute.

As to the first contenion, our answer is that the Federal statute is not in itself a limitation, but is merely a restriction on the freedom of carriers to insert such provisions in their bills of lading. Our answer to the second contention is that the clause in the bills of lading is rendered illegal, null and void by the language of the Interstate Commerce Act already quoted, since the bills of lading require the institution of suit in less than the minimum time authorized by the statute.

We contend further that even if the bill of lading provision were valid and legal it has not the effect of supplanting or waiving the shorter state statute of limitation.

The history of the case is as follows:

On April 12th, 1922, Gardiner filed suit against petitioner in the Eighteenth Judicial District Court for the Parish of Acadia, State of Louisiana, for $324 for loss of or damage to a shipment of household goods and two automobiles made by him on April 3rd, 1920, from Crowley, La., to himself at Murray, Ky., via petitioner as initial carrier, which said shipment in its damaged condition was delivered at destination on April 15th,

1920. Petitioner issued two through bills of lading, one covering the household goods and the other the automobiles.

Petitioner filed an exception based on the state prescriptive statute, above quoted, which on May 10th, 1922, was maintained by the trial court and the suit dismissed.

Gardiner appealed to the Court of Appeal for the First Circuit, State of Louisiana, and on December 6th, 1922, that Court reversed the judgment of the District Court, maintaining the exception, and remanded the case.

Trial of the case in the District Court resulted in a judgment in favor of Gardiner for the full amount claimed, entered on March 18th, 1924. Petitioner thereupon appealed to the State Court of Appeal, which on December 30th, 1924, entered judgment adhering to its original view that the prescriptive plea should be overruled and affirming, but modifying in amount, the judgment of the District Court. Petitioner's application for a rehearing was denied on February 18th, 1925, and its application to the State Supreme Court for writs of review was refused on March 30th, 1925.

Thereafter, and in due course, a writ of error to this Court was sued out and perfected, that proceeding being No. 1250 of the docket of this Court.

The purpose of the present application is to ask a review by this Court of the questions involved, which

are by petitioner regarded as extremely important, both financially (claims involving large sums being dependent on the decision of this case) and as a matter of proper handling of claims by carriers and the filing of suits by shippers.

II.

ARGUMENT.

A.

Paragraph 11 of Section 20 of the Interstate Commerce Act is not a statute of limitations.

The language relied on by our opponent and regarded by the State Court as a statute of limitation is:

> "It shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise a shorter period * * * for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice."

It is submitted, in the first place, that the purpose and intent of this provision is so clear as hardly to be susceptible of argument. If, however, argument be necessary, the history of the provision is conclusive.

It was for many years a common practice on the part of carriers to insert in their bills of lading clauses forbidding the institution of suit after various brief periods. Such provisions were sometimes upheld by the courts and were sometimes disregarded on the

ground that they were unreasonable and in contravention of public policy. The question was definitely settled by this Court in **Missouri, Kansas & Texas Ry. Co. vs. Harriman, 227 U. S. 657,** decided in 1913, when the validity of a ninety-day bill of lading limitation was upheld.

Not being satisfied with this result, Congress in 1915 enacted the so-called Cummins Amendment to Paragraph 11 of Section 20 of the Interstate Commerce Act, making it unlawful for carriers to limit, except to the extent named, the time after which suits might not be brought against them. The statute as originally passed authorized contractual limitations forbidding the bringing of suit later than two years and one day from the date of delivery of the property, but the section was amended by the Transporation Act, 1920, so as to read as hereinabove quoted.

In the light of the foregoing, it is clear that the purpose of the Cummins Amendment was not to prescribe a period of limitations, but simply to restrict the freedom of the carriers in inserting contractual limitations in their bills of lading. Had Congress desired to enact a statute of limitations it would have been a very simple matter to do so, but it is obvious that Congress concluded to leave this portion of the field of interstate commerce open to state regulation.

B.

The bill of lading provision relied on is wholly illegal, null and void.

The clause in the bills of lading was:

> "Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the shipment."

The purpose and effect of the clause was to forbid the institution of suit later than two years and a day after the **delivery of the shipment.**

Reference to the Cummins Amendment as amended by the Transportation Act, 1920, will show that under the law, as it stood at the time this shipment was made, it was unlawful for a carrier

> "to provide by rule, contract, regulation, or otherwise a shorter period * * * for the institution of suits than two years"

from the date of written declination of the claim. Claim cannot be filed and then declined in writing until after the delivery of the property. Therefore, the prescriptive period fixed by the bill of lading provision was shorter than that authorized by the Cummins Amendment, and accordingly by the very language of the Cummins Amendment the bill of lading provision was unlawful.

If unlawful, the provision must be regarded as null and void and of no effect. Any suggestion that the provision should be judicially recast so as to bring it within the pale of legality is not countenanced by any decision which we have been able to find. If such a suggestion were sound, it would necessarily follow that had this suit not been brought until more than two years after the written declination of the claim, the

carrier could then have pleaded as a bar to the suit the bill of lading provision recast so as to conform to the law.

Can it be suggested that under such circumstances any court would validate a provision in itself illegal? Yet if the provision could not be validated for the benefit of the carrier, why should it be validated for the benefit of the shipper?

There have been many decisions holding similar provisions invalid because too short and, therefore, unreasonable. Now had the courts been vested with the healing power of stretching such provisions to the point of reasonableness, it would not have sufficed in such cases to determine merely whether the stipulation pleaded was unreasonable, but the courts would have had to go further and determine what would be reasonable; and if such a reasonable period had elapsed before the institution of suit, then apply the altered limitation and dismiss the suit. Even clearer would this be in such a case as that resulting from the Texas statute forbidding carriers to require the institution of suits in less than two years. A shorter limitation was held null and void in **Southern Kansas Ry. Co. vs. J. W. Berges, 90 S. W. 189 (Texas)**, but neither in that case nor any other, either under the Texas statute or any other, have we found any intimation that the stipulation be rewritten as to conform with the minimum requirement of the law. That such limitations are treated as utterly null and void and therefore as if not written is illustrated by **Adams Express Co. vs. Walker,**

83 S. W. 106, 119 Ky. 121. Numerous other cases to the same effect will be found under the head of "Carriers" in the American Digest, Section 160.

It is significant that in hardly any of these cases is the date when suit was instituted mentioned, from which it follows that it was considered of no importance.

Our conclusion on this branch of the matter is that since the bill of lading provision was contrary to the Federal statute on the subject, the former must be regarded as null and void and treated as if not written.

C.

Even if the bill of lading provision were valid, it has not the effect of supplanting or waiving the state statute of limitations.

In connection with point A, we have already shown that the Cummins Amendment was and is in no sense a statute of prescription, but was intended merely as a restriction on the right of carriers to exercise the privilege of placing in their bills of lading a limitation on the time in which suits might be brought. There is no obligation on carriers to place any limitation in their bills of lading, Congress simply having said to the carriers, "if you do put any contractual limitation in your bills of lading, it cannot be for a shorter term than that named in the law."

The purpose and effect of this amendment cannot be said to be to confer on the shipper any right which he

did not already have. Still less would the insertion by the carrier of the clause in question in the bill of lading confer on the shipper any additional right. The words actually used were:

> "suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property."

Had a grant in favor of the shipper been intended, the wording would have been along some such lines as the following:

> "suits for loss, damage, or delay may be instituted at any time within two years and one day."

Such a provision as we suggest might be deemed to extend a permission and grant an authority to file suit at any time within the period specified, but that is exactly the type of provision not found in the bill of lading. The language of the bill of lading involved in this case is practically identical with that of Paragraph 11 of Section 20 of the Interstate Commerce Act as it stood before the amendment of February 28th, 1920, by which amendment, as we have already pointed out, that particular language was rendered null and void.

It is to be remembered that the same bill of lading is used in each of the forty-eight states of the Union and that each state has a different statute of limitations applicable to loss and damage suits against carriers. It happens that the Louisiana statute provides for a rather short period. The provision under consideration is not certainly useless even if the suit should be

brought in a state where the prescriptive period is shorter, as statutes of limitations are frequently amended or repealed; and it would, of course, be very important should suit be brought in a state where a longer prescriptive period prevails. Therefore, to stipulate that suit should not be brought after two years from delivery of the property was possibly useful as to some states—and certainly useful as to the rest.

Plaintiff's contention necessarily involves the proposition that the purpose and effect of the bill of lading provision, although couched in the words we have quoted above, is to waive altogether at the inception of the contract the state statute of limitations. Not only is such an intention so rare that we have not been able to find any example thereof, but it is expressly reprobated in the only place we have found it even suggested, that is in Article 2460 of the Louisiana Civil Code: "One cannot renounce a prescription not yet acquired, but it is lawful to renounce a prescription when once acquired." This article of the Code is but an expression of the general policy of the law in regard to statutes of limitation. Prescriptive periods are favored by the law for the reason that they tend to the prompt settlement of differences. They expedite litigation and are calculated to prevent the assertion of stale claims. "Interest reipublicae ut sit finis litium."

In pursuance of this policy, the Courts have generally held that in the absence of statutory provision to the contrary, parties may by their agreements shorten the statutory prescriptive period. This is an ordinary

practice in the case of insurance policies. It is usual to provide in such contracts that the prescriptive period shall be one year from the time the cause of action accrues. On the other hand, the lengthening of the prescriptive period by contract at the very inception of the contract is in violation of this well-settled policy. Hence, if we assume that the carrier intended at the inception of the bill of lading contract to waive the prescriptive period established by the state law, we attribute to the carrier an intent to do something extremely unusual and in violation of the general public policy in regard to statutes of limitation.

It is submitted that such an intention should not be attributed to the parties in the absence of a very clear and definite showing of an unmistakable intent. Such a showing cannot be made. Moreover, the clause in question has an entirely different meaning, purpose and intention. A reasonable and fair interpretation of the bill of lading provision is the following:

> "Suits for loss, damage, or injury, may be instituted within the periods of limitation prescribed by state statute, but shall not be instituted later than two years and one day after the delivery of the property."

This interpretation gives full value to the bill of lading provision and does not either disregard the manifest intention of Congress and of the parties to the contract or nullify the shorter state statutes of limitation. It is, moreover, in keeping with the spirit of the general law as to statutes of limitation and of

our own law, which forbids the renunciation of a prescription not yet acquired.

Our opponents argue that the entire matter of the bill of lading or shipping contract is beyond the power of the states, as that field has been taken charge of by the Federal Government, and that, therefore, the state act on which we rely is not applicable. It is true that there are many decisions of this Court to the effect that the interpretation and construction of various clauses in bills of lading are not subject to particular state rules or regulations, but all such decisions deal with rights given by provisions in the bills of lading and not with matters of remedy. The line of cases on which such reliance is placed is well illustrated by **Adams Express Company vs. Croninger, 226 U. S. 491,** in which the question was as to the validity of a provision in the bill of lading limiting the recovery to the amount expressly stipulated in the bill of lading. The Supreme Court, despite a statute of the State of Kentucky, in whose Courts the case originated, declared the bill of lading stipulation valid as a matter of general law.

As to the distinction between the contractual rights and the time for suit, see also

Koshkonong vs. Burton, 104 U. S., 668.
Terry vs. Anderson, 95 U. S., 628.
12 Corpus Juris 987, Note No. 97.
Atchafalaya Land Co. vs. F. B. Williams Cypress Co., 146 La. 1047, 1064-5, 258 U. S., 190.

The states are not ousted from the entire field of interstate commerce.

> "* * * the mere creation of the Interstate Commerce Commission, and the grant to it of a **measure of control** over interstate commerce, does not of itself, and in the absence of specific action by the commission or by Congress itself, interfere with the authority of the states to establish regulations conducive to the welfare and convenience of their citizens, even though interstate commerce be thereby incidentally affected, so long as it be not directly burdened or interfered with." M., K. & T. R. R. Co. vs. Harris, 234 U. S., 412, 417.

That case upheld the validity of a Texas statute allowing a successful plaintiff an attorney's fee collectible from an interstate carrier in a suit for loss and damage to an interstate shipment.

Subsequent decisions to the same effect are: **Chicago & N. W. R. Co. vs. Nye-Schneider-Fowler Co., 260 U. S., 35; Southern Railway Co. vs. Clift, 260 U. S., 316;** and **Atchison, T. & S. F. R. Co. vs. Vosburg, 238 U. S., 56.**

It is still less true that on this particular question of the time of bringing suits Congress intended to or did prescribe a statute of limitation. As heretofore pointed out by us, there was nothing in the Interstate Commerce Act on this subject until 1915. Up to that time it is therefore clear that statutes of limitation of the various states applied to actions of this kind.

It is to be noted that the Croninger case, and all othes of this class, grow out of the attempt through state rules or regulations to take away or nullify positive rights established by provisions in the bills of lading, and none of them deals with the exercise of the right to sue. In the present case no right to sue is given by the bill of lading clause on which plaintiff relies. The only right given by that clause is to the carrier to plead it as an absolute defense after the lapse of time provided by the said clause. If the clause gave a right to sue, it might be that plaintiff could properly cite the decisions on which he now erroneously rests his case. This distinction is recognized in **New York Central R. R. Co. vs. Lazarus, 278 Fed. 900 (C. C. A. 2)**, in which suit was brought against a carrier for loss of or damage to a shipment moving prior to Federal control. The defendant set up as a defense the very clause in the bill of lading on which plaintiff now relies. This defense plaintiff sought to escape by virtue of the provision in the Transportation Act of 1920 that:

> "The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers * * * for causes of action arising prior to Federal control."

The situation was such that if the period of Federal control were included in computing the time, the claim was barred under the provision in question, whereas, if the period of Federal control were excluded, the claim was not barred. The Court held that the provision in the Transportation Act did not refer to contractual rights in favor of a carrier, but had reference only to statutory limitations and that, therefore, the

claim was barred and the defense accordingly good. The Court said, at p. 904:

> "Congress had the right to extend the statute of limitations **because the rights to bring the action did not enter into or become a part of the contract.** But where the time within which an action could be brought is agreed upon by the terms of the contract of shipment, it is one of the terms and conditions thereof, and Congress could not deprive the plaintiff in error of this property right, for to do so would be a violation of the provisions of the Fifth Amendment."

It is to be noted that had the Court regarded the bill of lading provision as a Federal statute of limitation, a different result must have been reached. And as the provision is not a Federal statute of limitation and there is, in fact, no Federal statute of limitations as to such claims, Congress evidently intended to leave the matter of statutory regulation to the states, with power to the carriers to shorten the period by contract to the extent allowed.

D.

The state statute of limitations was applicable.

Having now shown that there was neither a Federal statute of limitations nor a valid contractual waiver of the state statute, the only remaining question is as to the applicability of a state prescriptive statute to a cause of action founded on a Federal law. The answer is that if no limitation is created by Congress, the state statute of the forum must be enforced. **17 Ruling Case Law, 694, 695; Campbell vs. Haverhill, 155 U. S., 610;**

613-616; Chattanooga Foundry Co. vs. City of Atlanta, 203 U. S., 390, 397; Boman vs. Southern Menhaden Corporation, 284 Fed., 362.

CONCLUSION.

It is submitted that there was no Federal statute of limitations applicable to this case; that the bill of lading provision relied on was null and void, but even if good did not supplant or waive the state statute of limitations, and that therefore the said state statute should have been applied and plaintiff's suit dismissed.

Accordingly, we urge that the writ herein prayed for should be granted and that this Court should review the decision of the Court of Appeal for the First Circuit, State of Louisiana, and should finally reverse it and reinstate the original judgment of the District Court.

Respectfully submitted,

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